

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. z-736809-D1 AND  
ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Albert BAILEY, JR.

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1878

Albert BAILEY, JR.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 22 December 1970, an Examiner of the United States Coast Guard at Seattle, Washington revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a messman on board SS OREGON MAIL under authority of the document above captioned, on or about 29 November 1970, Appellant

- (1) assaulted the master of the vessel with a knife at Yokohoma, Japan;
- (2) assaulted the chief mate of the vessel with a knife; and
- (3) engaged in mutual combat with a fellow crewmember, one Edward Kala, with a fist.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of OREGON MAIL and the testimony of four witnesses. In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specifications had been proved. The Examiner then served a written order on Appellant revoking all documents issued to him.

The entire decision was served on 13 January 1971. Appeal was timely filed on 12 February 1971. Although Appellant had until 14 June 1971 to do so, he has not added to his original statement of grounds.

### FINDINGS OF FACT

On 29 November 1970, Appellant was serving as a crew messman on board SS OREGON MAIL and acting under authority of his document while the ship was at Yokohama, Japan.

At about 1600 on that date, while Appellant was working in the galley, one Edward Kala addressed Appellant with an obscene expression. Heated discussion followed, after which Appellant followed Kala to the messroom and struck him, knocking him down, and kicking him in the groin.

When Appellant announced his intention of getting a knife Kala asked the steward to obtain help. While Kala went to look for the master, the chief mate arrived on the scene. Appellant had armed himself with a French cook's knife, with a blade about twelve inches long. When the mate attempted to disarm Appellant, first by discussion and then by an effort to grasp the handle of the knife, Appellant held the knife in a position ready to be thrust at the mate. He said, "Don't press your luck, mate," or words to that effect. The mate was afraid that if he attempted to perform the lawful act of a further attempt to disarm Appellant, Appellant would stab him in his midsection. The mate backed off and then left to call the master.

In the meantime, the master, who had been alerted, arrived on the scene. By this time Appellant had disposed of the French knife down the garbage chute. He obeyed the order of the master to go to his room and pack so as to leave the vessel and be discharged. Appellant continued his threats to kill Kala.

As the master stood in the passageway outside Appellant's door, Appellant, using obscene and abusive language to the master, demanded to be given his money. The master told him that proper procedures would be followed in the discharge and payoff. Appellant declared that during his war service he had killed better Captains than this one.

At one point Appellant went to a shelf so that he stood with his back to the master. When he turned he had in his hand an opened clasp knife. He took about two steps toward the master, in the course of which he raised the knife at about shoulder level, addressing it toward the master. The master leveled a .38 revolver at Appellant's midbody. After a brief argument over whether the master could shoot first or Appellant could cut first, Appellant dissuaded and turned the knife over to the steward who was present.

Very shortly thereafter, local police took Appellant into custody. Appellant was discharged and paid off that day.

### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The grounds urged for appeal are three:

- (1) exceptions raised by Appellant in the initial hearing;
- (2) errors in the records;
- (3) lack of jurisdiction.

### OPINION

#### I

The first two bases of appeal urged, "exceptions raised ... in the ... hearing" and "errors in the record" are not set forth with the specificity required by 46 CFR 137.30-1 (f) to be given attention. While jurisdictional questions may be raised at any time, they should be raised with specificity and in this case they have not been. A mere assertion of "lack of jurisdiction" without more, such as we have here, is not sufficient either, and may be more than met by the findings here that Appellant was serving under authority of his document at the time and place in question. There is no serious, or even conceivable, challenge to jurisdiction under R.S. 4450.

#### II

Aside, I may say that I can, after review, detect only one real "error in the record." Appellant was initially charged with having assaulted and battered Kala with his fist. The Examiner, on his own motion, after hearing, amended this specification to substitute the words "engage in mutual combat" for the words "assault and batter," so that technically the specification, as amended and found proved, reads: "did ... wrongfully engage in mutual combat a fellow crewmember, to wit P.O. Messman Edward Kala, with your fist."

On this point, the Examiner, having found that Kala had provoked the encounter by using obscenities to Appellant, declared that words are not legal provocations to assault and battery and that Appellant had, by his own admission, struck the first blow. Still, the Examiner was willing to give Appellant "the benefit of the doubt" and call the offense "mutual combat." R-74 In his opinion, written later, the Examiner notes that Appellant "by his own admission, entered into mutual combat with the messman." D-5.

The Examiner continues to say, "The intent with which the assault was committed in this case ... "

Appellant did not merely admit entering "mutual combat" with Kala. After admitting the assault and battery, found by the Examiner to have been illegal (R-74) and specifically referred to by the Examiner as an assault (D-5), Appellant never did claim to have been struck by Kala at any time. In fact he admitted that Kala never struck him at all. R-69.

It is clear from this that regardless of any sympathy the Examiner felt for Appellant because of Kala's provocative language (and possibly because of Kala's having admitted to having had several drinks before he appeared to testify), the Examiner's judgment that only "mutual combat" was proved is legally indefensible both on the transcript of proceedings and on the Examiner's own opinion.

Assault and battery, and nothing else, was proved with respect to Kala on this record.

If the Examiner wished to consider strong provocation as a mitigating element it was open to him to say so. It was not proper to convert an admitted assault and battery, pleaded in the specifications and proved on the record, admitted and found to have been proved by the Examiner in open hearing, to a "lesser included offense."

It seems from this that some clarification of the "lesser included offense" of "mutual combat" as misconduct may be desirable here. The law of assault, the law of assault and battery, and the concept of a "lesser included offense" of mutual combat seem to give investigators and Examiners both continuing trouble. It is not true, as seems to have been thought in this case, that "wrongful mutual combat" is always a lesser included offense of "assault and battery."

The first step in understanding the concept of "mutual combat" is the understanding that it is misconduct for two seamen to agree to fight and then to fight whether "on the dock" or somewhere aboard ship.

When one or both parties to a physical encounter, the beginning of which was not observed by a reliable third party witness, may be found to have engaged in "mutual combat" under a specification of assault and battery, but the record must somehow support a finding as to the mutuality of the combat.

Extreme care must be used in exercising judgment in such

matters. An examiner may find that an agreed upon combat was established. An Examiner may also find that a combat was established under such conditions that while the outset remained unknowable the situation presented evidence of mutuality. In either case an examiner may find either "wrongful mutual combat" as alleged or "wrongful mutual combat" as lesser than assault and battery.

It is impossible to apply the concept of "mutual combat" to a case in which an initial assault and battery has been established. The only new concept that can be introduced then is that of purported self-defense in which the "self-defense" itself exceeds permissible limits and becomes itself assault and battery.

"Mutual combat" never entered the instant case at all. It was error for the Examiner to have amended the specification when he found, in fact, assault and battery. The error was, however, in favor of Appellant and under policies long established I am not inclined to reamend the specification in question so as to find proved the assault and battery originally alleged, although there is no legal bar to my doing so.

#### CONCLUSION

The order of revocation made is justified for the two offenses by Appellant committed against ship's officers with knives, and the offense against Kala, even though improperly reduced to "mutual combat", in view of Appellant's prior record of violence.

#### ORDER

The order of the Examiner date at Seattle, Washington on 22 December 1970, is AFFIRMED.

T.R. SARGENT  
Vice Admiral, U.S. Coast Guard  
Acting Commandant

Signed at Washington, D.C., this 18th day of May 1972.

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